

**MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY
REMEDATION AND REDEVELOPMENT DIVISION**

CLEANUP PROGRAM REDESIGN FREQUENTLY ASKED QUESTIONS

February 13, 2009

These questions have been submitted as part of the input process regarding the cleanup program redesign proposal. The answers are provided as an informal mechanism to share information regarding Remediation and Redevelopment Division's (RRD's) intent or otherwise provide clarifications to statements made during the presentation of the proposal. The answers are not intended to be a formal response. They represent the current Michigan Department of Environmental Quality (MDEQ) thinking and may need to be updated as the input process progresses. Copies of the redesign presentations are available by sending an e-mail to bancroftk@michigan.gov.

Q1: Will MDEQ keep the QC/CP program or some form of the program?

The fate of the QC/CP program seems uncertain at this point. Some discussion suggests this program could be eliminated altogether. The QC/CP program was originally put in place to ensure that reputable environmental professionals with the proper credentials were managing cleanup work at LUST sites. Prior to the QC/CP program, MUSTFA was plagued with incompetent cleanups being lead by unqualified individuals. The resulting cost overruns and abuses lead to premature demise of the MUSTFA program. Elimination of this control mechanism may lead to incomplete or inefficient work being performed once again on LUST sites.

A1: As discussed at the November 7, 2008, presentation in response to a question regarding the future of the QC/CP program, our expectation is that the QC/CP program would be eliminated. The MDEQ believes the QC/CP program is an artifact of a time and set of circumstances that no longer exist. The program was developed under the MUSTFA Act in an attempt to control charges to the MUSTFA fund and to ensure that corrective action work was conducted in accordance with statutory requirements. This was in conjunction with the idea that the audit based approach under Part 213 would benefit from a separate set of consultants operating in the leaking underground storage tank area; and through enforcement of the statute, rules, and effective use of the revocation process the MDEQ would be able to ensure that a QC/CP demonstrates the expertise and capability to conduct corrective actions required at LUST sites. The QC/CP program was intended to protect owners and operators who are required by law to hire a QC approved by the state, and at the same time protect the health, safety and environment of the state. However, neither the circumstances under which the program was developed nor the benefits envisioned are current reality.

The MDEQ also believes limiting LUST work to a select group of environmental professionals, who essentially have the same qualifications as professionals providing services for the remaining sources of releases, is not equitable and no longer fits the needs of the industry. A potential solution to this issue is developing a QC/CP-like program for all environmental professionals working in Michigan; however, in times like today where budgets and resources are limited, we must approach our allocation of budget and resources carefully. The MDEQ simply does not have the financial resources to develop, implement, and administer such a program. Furthermore, and perhaps most importantly, the MDEQ does not have any evidence that the quality of work being done inside QC/CP

universe is substantially different than the work done by those consultants outside of the QC/CP universe.

The MDEQ's perception is that the resources currently put into the QC/CP program could be redirected to better effect. Going forward those people responsible for response actions at LUST sites will have to take responsibility for selecting a consultant to provide services that meet their needs. This will essentially place those responsible for LUST sites in the same position as all others responsible for responding to releases. The MDEQ would suggest, in collaboration with the consultant community, that some consumer education be prepared. This could include developing materials to help parties, particularly the less technically sophisticated consumers, select a consultant that could meet their needs. Perhaps, a set of questions could be developed to give them the opportunity to compare consultants who would be offering their services.

While it does not reflect upon our answers to the fate of the QC/CP program, the MDEQ does not concur with the statement that "Prior to the QC/CP program, MUSTFA was plagued with incompetent cleanups being led by unqualified individuals. The resulting cost overruns and abuses lead to premature demise of the MUSTFA program." The MUSTFA program was simply underfunded to support the cleanups of the number of sites where contamination existed from LUST releases.

Q2: Will MDEQ use the nationally-accepted industry standard Risk-Based Corrective Action (RBCA) process going forward?

The idea of combining Part 201 and Part 213 is fundamentally sound because the approach to investigation and remediation should be essentially the same no matter where the source of contamination originated; spill, drum, UST, etc. However, the proposed revised program has only subjective guidance for determining risk based on "Categories". It is also unclear what role operational memorandums will continue to play, if any, in the process. Rather than rely on Operational Memoranda, emphasis should be placed on applying the RBCA process over all sites of environmental contamination.

This approach has been successful in Illinois; the RBCA equations were written into the final rules promulgated in Illinois for all sites of contamination. Why can't Michigan duplicate this? At this point, the rules for Part 201 statute are broad and vague and rules for Part 213 statute are non-existent. The program revision being undertaken represent an opportune time to apply some consistency across the board by developing rules that can be followed for evaluating real (not subjective) risk at all sites of environmental contamination and provide a clear roadmap to closure and not rely on subjective operational memoranda.

A2: The MDEQ needs to better understand what provisions of the redesign proposal are considered not consistent with the RBCA process. References to specific provisions of the RBCA process, rather than a broad reference to the RBCA process would be most useful to assist our understanding.

The MDEQ is requesting clarification on why the proposed framework is considered to only have subjective guidance for determining risks based on "Categories". As stated in the roll-out presentation, the purpose of the categories are to: 1) allow the nature of the risks that result from a release to be effectively communicated to the public, 2) to focus available

resources (public and private) on the most significant risks, and 3) to provide a means to reliably measure progress in risk reduction. The proposed “Categories” application to a site would be determined from the risks represented at the site, which the MDEQ considers to be directly consistent with the RBCA process.

Under the proposal, consistent with any risk-based program, the risks would generally be determined based on comparisons to criteria, developed from promulgated equations, for reasonable and relevant exposure pathways. Where criteria cannot be readily developed evaluation of the conditions to determine the site-specific risks will be necessary. This approach is currently provided by the Part 201 rules and is consistent with the RBCA process in developing Tier I criteria. While some may view a site specific evaluation of every site to be the best approach, implementation and management of a cleanup program requiring a site-specific evaluation for every site would be highly complicated and challenging for both the regulated party and the regulator. This is especially true considering the typical limited budget and resources available. It would also not meet the redesign objectives identified for reducing complexity and increasing transparency.

The MDEQ does not anticipate that it will be possible to develop a statute and rules that require no additional guidance documents. In benchmarking the current cleanup program against other state cleanup programs, the MDEQ has found that the use of guidance documents is consistent throughout the states, regardless of the details provided in the individual program’s statute and rules or the reliance on the RBCA process.

Q3: How will source control be defined?

MDEQ suggested the development of incentives to assist with source removal. The concept of offering tax credits for conducting source removal could be of great benefit to owner/operators that lack the resources to conduct source removal. However, there is a limitation with this type of mechanism with respect to small owner/operators with low tax burdens as well as orphan sites. Funding needs to be put in place to address these sites that might otherwise fall through the cracks, or present high risks to the public and/or environment.

A3: The MDEQ anticipates that it will need to convene some kind of stakeholder process to develop the definition of source, source removal and source control. We invited volunteers to participate in this and other processes at the roll-out presentations. Additional information on the stakeholder process will be distributed to list server subscribers and posted on the redesign webpage.

The MDEQ recognizes the limited benefit of tax credits as the only incentive, understanding that tax credits do not address the need for upfront monies to pay for the actions necessary to qualify for the credits. The MDEQ is investigating the potential for a low interest loan program, or low interest guarantee for commercial lenders. Additional input will be sought for the type of incentives owners and operators will find most beneficial. The need for adequate funding for orphan sites is being pursued separately from the redesign process.

Q4: What do the proposed program changes do to help define the end to the cleanup process? Why was the word “closure” not used in the presentation?

No real mechanism for closing sites was discussed in the presentation. Only with a true scientifically verified, risk-based process is there a mechanism for closing a site.

Absent this, it appears that MDEQ intends for sites to be evaluated subjectively by placing them in categories and to keep sites open by requiring “monitoring”. Please define the objectives and a clear process for reaching an end point and achieving closure.

- A4:** It is correct that the MDEQ has not used the term “closure” in the presentation of the redesign proposal. Over time the MDEQ has found that the use of the term “closure” provides a false sense of security to the public. Routinely the MDEQ encounters situations where the public believes that if the MDEQ concurs that a site is “closed” no further risk exist at the site, which is generally not the case. The MDEQ has the goal of effectively communicating the nature of the risks at a site to the public. Using the “closure” label where the risks are appropriately managed or controlled but still remain, provides a false sense of security and is not appropriate.

The obligations of maintaining and monitoring the conditions to ensure the risk based decision made that the property is safe for a specific use is part of both existing cleanup programs, and consistent with RBCA Sections 6.12 and 6.13.

As discussed during the presentation, the MDEQ is open to using terms other than the proposed category numbers for compliance points. In the continuing development of the redesign cleanup, programs in other states are being reviewed. One finding is that Alaska recently revised its “site closure” requirements and revised their terms to use “cleanup” rather than “closure”. The MDEQ redesign team has suggested the use of “Cleanup-property use controlled”, “Cleanup-exposures controlled”, and “Cleanup-MDEQ approved” may have merit, and is open to any further suggestions received.

Q5: How will the enforcement process work under the revised program?

With such a subjective process for identifying and quantifying risk proposed by the MDEQ, owner/operators of facilities or sites will want a clearly defined process to obtain closure and avoid enforcement action where possible. It does not appear that the revised program offers a clear path to avoid enforcement action. It appears that enforcement action could take place at any point in the proposed process if the MDEQ so dictates regardless of whether there is a real risk or not. There is no clearly defined process (i.e. RBCA) for identifying true risk to human health and the environment and subsequently achieving closure, and therefore no mutually agreed mechanism, which if followed during the process, would allow owner/operators to avoid enforcement action.

- A5:** The proposed redesign incorporates compliance points (multiple points) for an owner or operator of any facility, including LUST sites that are not available within the current statutes. The MDEQ understands that sufficient details with respect to obligation time frames and associated actions have not yet been provided in order to allow a clear comparison, but the intent of the redesign is that compliance would be easier to demonstrate, not more difficult. As these provisions are further developed there will be opportunities for additional input, and we invite volunteers to participate in this process. As indicated in the question regarding the RBCA process, the MDEQ is requesting clarification on items within the RBCA process that are believed to be not included or different from the elements of the proposed redesign.